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No. 92-1043

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

CRITICAL MASS ENERGY PROJECT,
Petitioner,

v.

NUCLEAR REGULATORY COMMISSION
and
INSTITUTE OF NUCLEAR POWER OPERATIONS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PETITIONER'S REPLY BRIEF 1

CONCLUSION 9

TABLE OF AUTHORITIES

Cases: **Page**

Acumenics Research & Technology v. Department of Justice, 843 F.2d 800 (4th Cir. 1987) 2, 6, 7

Anderson v. HHS, 907 F.2d 936 (10th Cir. 1990) 2

Brockway v. Department of Air Force, 518 F.2d 1184 (8th Cir. 1975) 5

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 8

Chrysler Corp. v. Brown, 441 U.S. 281 (1979) 6

Consumers Union v. Veterans' Administration, 301 F. Supp. 796 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971) 5

Environmental Technology, Inc. v. EPA, Civ. Action No. 3:92CV363 (E.D. Va. Jan. 21, 1993) 6

General Electric Co. v. NRC, 750 F.2d 1394 (7th Cir. 1984) 7

Lujan v. National Wildlife Federation, 496 U.S. 871 (1990) 8

McDonnell Douglas Corp. v. Rice, No. 92-2211-JHG (Sept. 30, 1992) 6

National Parks & Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974) ..... 2, *passim*

9 to 5 Organization for Women Office Workers v. Board of Governors, 721 F.2d 1 (1st Cir. 1983) 2, 5, 7

Pacific Architects & Engineers v. Department of State, 906 F.2d 1345 (9th Cir. 1990) 2, 7

Statutes, Rules and Legislative History:

Administrative Procedure Act, 5 U.S.C. § 706(2)(A) 6

Federal Advisory Committee Act, 5 U.S.C. App. § 10 3

Government in the Sunshine Act, 5 U.S.C. § 552b(c)(4) 3

Trade Secrets Act, 18 U.S.C. § 1905 6

Supreme Court Rule 10(c) 3

S. 1666, 88th Cong., 2d Sess (1964) 5

S. Rep. No. 1219, 88th Cong., 2d Sess. (1964) 5

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1. The Solicitor General acknowledges that "the proper standard for determining whether information is 'confidential' within the meaning of Exemption 4" is surely an issue worthy of this Court's consideration. Fed. Brief in Opp. 9. The Government also does not dispute that none of the seven other Circuits that have already considered the scope of Exemption 4 has adopted the D.C. Circuit's distinction between information submitted voluntarily and information obtained under compulsion — even though at least three of those Circuits have issued major Exemption 4 decisions, in which that distinction might have been dispositive, since it was first proposed by Judge Buckley in his dissent to the first panel decision below,

Pet. App. 62a-64a.[1] The Government further concedes that the decision below is inconsistent with the First Circuit's disposition of *9 to 5 Organization for Women Office Workers v. Board of Governors*, 721 F.2d 1 (1st Cir. 1983).

Nevertheless, the Solicitor General urges this Court to defer consideration of the important issue presented in this case until other Circuits have considered the distinction announced in the decision below. The Solicitor General fails to explain, however, why those Circuits should be forced to reconsider a rule that they have already adopted. If the issue is an important one — and the Government agrees it is — then this case, with a full record and five judicial opinions addressing the scope of Exemption 4 in depth, is the ideal vehicle for addressing it.

The Solicitor General's brief in opposition also reveals that the Department of Justice does not accept the decision below as the last word on Exemption 4. Rather, the Justice Department will continue to argue that *National Parks and Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), should be entirely overruled and replaced with the rule that it urged to the *en banc* Court, *viz.*, that all information not customarily disclosed to the public is "confidential" under Exemption 4, irrespective of the manner in which the Government obtains the information. Thus, the Government maintains that the *en banc* Court's partial reaffirmation of *National Parks* was "technically . . . dicta," Fed. Brief in Opp. 11, even though the very question on which the Court of Appeals ordered rehearing was whether *National Parks* should be reconsidered. *See* Pet. App. 9a. It appears that the Justice Department views the proper scope of

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[1] *See Acumenics Research & Technology v. Department of Justice*, 843 F.2d 800 (4th Cir. 1987); *Pacific Architects & Eng'rs v. Department of State*, 906 F.2d 1345 (9th Cir. 1990); *Anderson v. HHS*, 907 F.2d 936 (10th Cir. 1990).

Exemption 4 as entirely up for grabs, and will argue to the D.C. Circuit, and every other Circuit, that *National Parks* should be entirely overruled.

In other words, the Department of Justice — which is responsible for defending almost every FOIA case and reverse-FOIA case — now believes that the interpretation of Exemption 4 in every Circuit, including the D.C. Circuit, is wrong. If there were ever a situation in which "an important question of federal law . . . has not been, but should be, settled by this Court," Sup. Ct. R. 10(c), this is it.

The Government also ignores at least four other closely related statutes that incorporate the *National Parks* test. *See* Pet. for Cert. 13. In particular, it offers no explanation about how courts are to interpret the identically worded exemptions for business records in the Government in the Sunshine Act, 5 U.S.C. § 552b(c)(4), and the Federal Advisory Committee Act ("FACA"), *see* 5 U.S.C. App. § 10, both of which operate in close conjunction with the FOIA. The decision of the *en banc* Court will require reconsideration of the governing law for all four statutes, especially FACA, since almost all information submitted to federal advisory committees is submitted voluntarily.

2. The Government believes that the *result* reached by the Court of Appeals in this particular case is correct, but makes no serious effort to argue that the *rule* adopted by the Court of Appeals which must now govern all Exemption 4 cases in the D.C. Circuit, based on the manner in which information is obtained rather than the content of the information, is rooted in the text, legislative history, or purposes of the FOIA. The Government suggests that persons who submit information voluntarily to federal agencies may refuse to do so in the future if the agencies are compelled to disclose that information to the

public. *Id.* at 14.[2] But the Government does not address the principal threat posed by the Court of Appeals' distinction to the fundamental disclosure objectives of the FOIA: A categorical exemption for "voluntarily" submitted information encourages agencies to agree to the "voluntary" submission of secret information even when the agency could and would demand that information, and thereby to hide information from the public that would otherwise be subject to disclosure. We submit that is precisely the situation in this case, where analytical reports about a matter of the highest public importance, the safety of nuclear power plants, have been shielded from the public, even in the absence of a showing that any private or public interest would be harmed by disclosure, and even despite the concession by the Nuclear Regulatory Commission ("NRC") that it could require nuclear plant licensees to provide it with the same reports.

Moreover, the Government does not even attempt to link the Court of Appeals' rule to the core of Exemption 4, the protection of trade secrets and other competitively sensitive business information. It is undisputed that the reports at issue in this case are distributed to utility companies that may be in competition with each other. Every utility company that operates a nuclear power plant in this country is a member of respondent Institute of Nuclear Power Operations ("INPO") and receives the reports at issue in this case. In fashioning a rule that shields information with no relation to any firm's sensitive business secrets, the Court of Appeals strayed far from the interests that Congress intended to protect in Exemption 4.[3]

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[2] Under the *National Parks* test, courts must take that factor into account, although it is not necessarily dispositive. *See* Pet. for Cert. 19.

[3] The Government's attempts to find support in the legislative history of Exemption 4, Fed. Brief in Opp. 10-11, are to little avail.

(continued...)

3. We argued in the petition that the Court of Appeals' rule complicates, rather than simplifies, application of Exemption 4, because it provides no guidance for a wide range of cases where the manner of submission of the information cannot be pigeonholed as "voluntary" or "mandatory," and because it requires reconsideration of many issues in reverse-FOIA cases, previously thought to be definitively settled. Cases decided since the Court of Appeals' decision confirm these points, especially in the crucial area of FOIA requests for, and reverse-FOIA suits over, government contract information. The decision below has made it inevitable that the Government will now face many reverse-FOIA suits to prevent the disclosure of information that agencies could confidently disclose in the past. Even if the decision below has streamlined some aspects of FOIA litigation

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[3](...continued)
As the Government knows, passages in both the 1965 Senate Report and the 1966 House Report referring to information "which would customarily not be released to the public by the person from whom it was obtained" were evidently copied from a prior committee report accompanying an earlier and much broader version of Exemption 4, which was not limited to commercial or financial information, but which protected "other information obtained from the public and *customarily* privileged or confidential." *See* S. 1666, 88th Cong., 2d Sess., *reprinted in* 110 Cong. Rec. 17,087 (1964); S. Rep. No. 1219, 88th Cong., 2d Sess. 2 (1964). No explanation was given for the deletion of "customarily" between the 1964 and 1965 versions of the FOI bill, nor did any version of the earlier bill contain a definition of "customarily." It is clear, however, that Congress intended the final version of Exemption 4 to be significantly narrower than the earlier version. *See Brockway v. Department of Air Force*, 518 F.2d 1184, 1189 (8th Cir. 1975). Thus, courts addressing the particular passages quoted by the Government have found them to be of limited use in ascertaining the precise scope of Exemption 4. *See National Parks*, 498 F.2d at 769; *9 to 5 Org. for Women Office Workers v. Board of Governors*, 721 F.2d 1, 7 (1st Cir. 1983); *Consumers Union v. Veterans' Admin.*, 301 F. Supp. 796 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971).

(which we doubt), it has only shifted the complexity to reverse-FOIA litigation.

This point is well illustrated by the recent decision in *Environmental Technology, Inc. v. EPA*, Civ. Action No. 3:92CV363 (E.D. Va. Jan. 21, 1993), a reverse-FOIA suit, as well as another case discussed at length in the petition.[4] In *Environmental Technology*, the District Court enjoined the Environmental Protection Agency ("EPA") from disclosing information about unit prices charged by a contractor providing environmental cleanup services to the Government. The District Court concluded that the contractor's unit-price information was not required to be disclosed under the FOIA because it had been submitted "voluntarily" to EPA in response to EPA's request for bids, and was therefore exempt from disclosure under Exemption 4, as reinterpreted by the decision below. Slip op. at 5. Because the FOIA did not require EPA to release the information, the District Court reasoned, its disclosure would violate the Trade Secrets Act, 18 U.S.C. § 1905, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). *See generally Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

There is no doubt that the *Environmental Technology* case would have been decided in the opposite way under *National Parks*. Indeed, a prior decision of the Fourth Circuit reached the opposite result on virtually identical facts. In *Acumenics Research and Technology v. Department of Justice*, 843 F.2d 800 (4th Cir. 1988), the court ruled that the Department of Justice would not violate the Trade Secrets Act or the APA by releasing information about unit prices charged by a government contractor providing litigation support services. Applying the *National Parks* test, the Court of Appeals concluded that the information was not exempt from disclosure under Exemption 4. Because the information was subject to

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[4] *See* Pet. for Cert. 16-17, 24-25 (discussing *McDonnell Douglas Corp. v. Rice*, No. 92-2211-JHG (Sept. 30, 1992)).

disclosure under the FOIA, its release was not prohibited by the Trade Secrets Act, which permits disclosures "authorized by law." *See* 843 F.2d at 807-08; *see also Pacific Architects & Eng'rs v. Department of State*, 906 F.2d 1345 (9th Cir. 1990) (similar result).

Thus, the decision below conflicts not only with the First Circuit's decision in *9 to 5*, but also with every reverse-FOIA case in which the courts have interpreted *National Parks* to permit the release of information submitted voluntarily to the Government, especially government contract information. *See Acumenics*, *supra*; *Pacific Architects*, *supra*; *see also General Elec. Co. v. NRC*, 750 F.2d 1394 (7th Cir. 1984) (Posner, J.). In all of these cases, disclosure was *permissible* under the Trade Secrets Act only because disclosure was *required* under the FOIA, as construed in *National Parks*. Under the rule announced in the decision below, however, disclosure would probably be neither required nor permissible.

4. The Government criticizes the *National Parks* test as excessively complex, supposedly as illustrated by the Court of Appeals' two decisions to remand this case for further factual development. INPO also argues that the panel's decision to remand this case a second time was inconsistent with Rule 56 of the Federal Rules of Civil Procedure. INPO Br. in Opp. 17-20. Although these arguments are more appropriately addressed to the merits of the case, rather than its suitability for review in this Court, it is noteworthy that the *en banc* Court thought little of these points, and found the Government's citation of a few cases that might have been decided in another or an easier way insufficient to demonstrate the purported "unworkability" of *National Parks*. Pet. App. 12a-13a.[5]

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[5] If anything, the panel was too generous to the respondents in remanding the case a second time. The second panel unanimously stated that it had "searched the present record in vain for any evidence that would justify . . . a finding" that the quality of the INPO

(continued...)

The Government is also mistaken when it states that petitioner believes that only a "bright-line" rule is appropriate for Exemption 4. Fed. Brief in Opp. 17. Petitioner advocates a workable and sensible rule, not an arbitrary one that divides the entire world of information into two mutually exclusive categories. Because the decision below is neither workable nor consistent with the fundamental objectives of the FOIA, the writ of *certiorari* should be granted.

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[5](...continued)
reports could be impaired by disclosure. Pet. App. 84a-85a. In the absence of any evidence to support the NRC's contentions on a central issue in the case, on which the NRC bore the burden of proof, summary judgment should have been entered for petitioner. *See Lujan v. National Wildlife Fed'n*, 496 U.S. 871, 884 (1990); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

CONCLUSION

The writ of *certiorari* should be granted.

Respectfully submitted,

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